IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.9058 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

INTERNATIONAL STEEL CORPORATION

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 9058 of 1998

MR ANILKUMAR D MARU for Petitioner No. 1

..... for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 25/04/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This petition has been filed challenging the order-in-original and the order-in-appeal as confirmed by

the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai (CEGAT as it then was known). Though the petition is styled as a petition under Articles 226 and 227 of the Constitution of India, in fact it is a petition moved under Article 227 of the Constitution of India.

2. The petitioner, a Partnership Firm, is engaged in business of shipbreaking activity at Alang Ship Breaking Yard, Dist. Bhavnagar. On 24th July, 1990 the petitioner entered into a Memorandum of Agreement (MoA) for importing a vessel named "M.V. ANI" for breaking from one M/s. Quicktrade Limited, London. As per terms of the said MoA total price of US$ 11,44,250 was paid by the petitioner on the basis of LDT of the vessel worked out at 4577 MTs. According to the petitioner, this LDT was arrived at excluding the weight of Permanent Ballast 450 MTs. As stated in Paragraph No.2.4 of the petition "The seller has provided the Builder's Certificate (capacity plan) of the vessel in which LDT 5100 has been shown including Permanent Ballast (i.e. 450 LDT waste ballast)."

3. The petitioner relied upon certificate dated 2nd May, 1989 issued by LLOYD's Register of Shipping as well as Survey Report dated 18th October, 1990 of M/s.Ericson & Richards (Gujarat), which are respectively Annexure-D and Annexure-E to contend that as per the said certificates LDT of the vessel was 4650 MTs excluding the weight of the Permanent Ballast. Based on the aforesaid documents the petitioner filed Bill of Entry on 16th November, 1990 and paid Customs Duty to the tune of Rs.57,89,250/-. However, respondent No.3 authority assessed the Bill of Entry after adding 450 MTs being the weight of Permanent Ballast and issued challan demanding Customs Duty of Rs.63,49,500/-. The same was paid by the petitioner under protest.

4. The petitioner filed a claim for refund on 6th March, 1991 for a sum of Rs.5,60,250/- based on the differential LDT of 450 MTs. The refund claim was rejected by respondent No.2 vide Order-in-Original No.1/CUS/1992 dated 6th July, 1992. According to respondent No.2, the contention of the petitioner that Permanent Ballast had no value and was required to be thrown away was not acceptable and in light of provisions of Chapter 89 of the Customs Tariff Act and Schedule-I thereunder, in light of Chapter Note No.2, the petitioner was required to be assessed to duty on the basis of Light Displacement Tonnage in MTs, as per Builder's Registered LDT referred to in the Stability Book or the Builder's

Certificate at the time of initial commissioning of the vessel or the floating structure.

5. The petitioner carried the matter in appeal before Collector (Appeals), Central Excise and Customs, Ahmedabad, who passed the order on 27th August, 1993 rejecting the appeal. While rejecting the appeal the Collector (Appeals) recorded as under :

> "7. ..... The appellant nor his advocate was in a position to produce either the Stability Booklet pertaining to this vessel or the Builder's Certificate, which would indicate authentically LDT of the ship at the time of initial commissioning. Instead, they repeated their emphasis on the Survey Report by the Surveyor."
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> 8. In the absence of the Stability Booklet the Supdt. Customs, Alang in the Rajkot Collectorate has accepted the LDT as it appears in the Capacity Plan of the Ship in question which is inclusive of the Permanent Ballast. According to the book 'Ship Design & Construction' published by the Society of Naval Architects and Marine Engineers, New York, U.S.A., the light ship weight shall be the weight of the ship will all its equipments and outfits including Permanent Ballast (solid and liquid), spare parts etc. Permanent Ballast with reference to a vessel is an essential and indispensable element of that particular vessel. Permanent Ballast is being kept in the ship to stop it from rolling and for smooth voyage in sea. To provide the Stability effect to the vessel Permanent Ballast is a must. Therefore, in calculating the total LDT of the ship it has been very rightly the practice to include the Permanent Ballast."

6. The Petitioner's Second Appeal before CEGAT also met the same fate and the orders of the adjudicating authority and the appellate authority were confirmed by CEGAT vide its order dated 2nd June, 1988. CEGAT found that the duty on the vessel was assessed at specific rate and when the Chapter note itself indicated that LDT should be taken on the basis of builder's certificate, when the Assessing Officer had based the assessment on the builder's certificate available for the vessel, such assessment could not be faulted so as to entitle the appellants for refund. It has further been found by the

CEGAT, LDT of the vessel should be taken in the condition in which the vessel is imported which was with permanent ballast and the LDT as given in the builder's certificate.

7. Mr.A.D.Maru, learned advocate appearing on behalf of the petitioner, submitted that the petitioner had no dispute with the figures of the LDT stated by the customs authorities and CEGAT in the impugned orders. The dispute, according to Mr.Maru, was as to whether the Permanent Ballast could be included while calculating the LDT of the vessel. He placed reliance on the decision of Jalyan Udyog Vs. Commissioner of Central Excise, Mumbai, 2000 (115) E.L.T. 725 (Tribunal) which decision, according to him, was confirmed by the Apex Court as reported in 2002 (143) E.L.T. A81 (S.C.).

7.1 It was contended that the petitioner should be assessed to duty on the basis of commercial invoice and the price stated in the MoA because that was the basis on which the petitioner had purchased the vessel. Adoption of any other figure for levying the duty would not be in consonance with the understanding arrived at by way of agreement between the parties. In this connection he submitted that the Permanent Ballast was made of cement concrete and had no value so far as the petitioner was concerned.

7.2 Lastly it was contended that in case the Court was not inclined to accept the aforesaid submissions on merits, the petitioner must be permitted to go before the authorities to place on record the Stability Book or the Builder's Certificate which were not available on record.

8. As can be seen from the facts narrated hereinbefore, the adjudicating authority, the Collector (Appeals) and CEGAT have concurrently found that the petitioner has not been able to establish that LDT stated in the MoA and the invoice as well as Bill of Entry is based on the Stability Book or the Builder's Certificate at the time of initial commissioning of the vessel. Chapter 89 of the Tariff Act provides for the rate of duty in relation to ships, boats and floating structures. Under Heading No.89.08 duty is leviable on vessels and other floating structure for breaking up at the prescribed rate per Light Displacement Tonnage. In Chapter Note No.2 it is stated "In heading No.89.08 "Light Displacement Tonnage (LDT)" means LDT in metric tonnes as per Builder's Registered LDT referred to in the Stability Book or the Builder's Certificate at the time of initial commissioning of the vessel or the floating

structure; provided that in case of any change in LDT, the highest of the LDT indicated in any of the documents referred to above shall be taken for the purpose of levy of duty.".

9. Thus, the provision is clear and unambiguous. Duty is to be levied at the prescribed rate on the LDT and LDT means the figure stated in the Builder's Certificate or Stability Book in metric tonnes as per Builder's Registered LDT at the time of initial commissioning. Once the statute provides for levy of Customs Duty in a particular manner and defines the terms used therein, the authorities are bound to act in accordance with the statutory provisions. It is not open to the authorities to adopt any other standard or basis for computing the duty leviable on a vessel imported for breaking.

10. The facts go to show that despite the petitioner having been granted sufficient opportunity, the petitioner did not choose to place on record the Stability Book or the Builder's Certificate containing the Builder's Registered LDT in metric tonnes at the time of initial commissioning of the vessel. The reliance on behalf of the petitioner on certificate issued by Lloyd's Register of Shipping as well as a certificate issued by the Registered Surveyors, in absence of the prescribed documents, cannot be taken to be valid documents by the authorities. In the circumstances, the authorities would have no option but to go by the solitary document which was available on record i.e. Builder's Certificate (capacity plan) of the vessel in question. It is not disputed on behalf of the petitioner that the said document denoted LDT at 5100 MTs.

11. The reliance on the decision of the Tribunal (in case of Jalyan Udyog) cannot assist the case of the petitioner, despite the said decision having been affirmed by the Apex Court, as the Tribunal in the said decision was not called upon to render its decision in context of Chapter Note 2 of Chapter 89 of the Tariff Act. It is interesting to note that Mr.Maru has represented the assessee before the Tribunal in the reported decision and he has not urged that the Tribunal was called upon to render its opinion in context of the statutory provisions with which the present case is concerned.

12. The last contention raised on behalf of the petitioner that an opportunity should be granted to the petitioner to bring on record the documents in accordance

with Chapter Note 2 of Chapter 89 of the Tariff Act, does not merit acceptance for the simple reason that more than a period of 15 years has gone by since the original Bill of Entry was filed and nothing has been placed on record to show that the petitioner was in possession of the documents in question. Even if the petitioner is in possession of the documents in question, there is no explanation forthcoming as to why the same were not produced before the authorities at the relevant time.

11. In the result, the petition is rejected, there being no infirmity in the order of the Tribunal or the orders of the adjudicating authority and the first appellate authority.

12. Before parting it is necessary to note that though the petition was filed in the year 1998, and the matter was listed originally on 3rd December, 1998 thereafter the papers were not traceable. Office has made a submission that no order appears to have been made in the above matter and hence, as permitted by the Hon'ble the Chief Justice, record has been reconstructed. That is how the petition of 1998 has come up for admission hearing today.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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